FOR ARGUMENT

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No 02-361
In the Supreme Court of the United States

UNITED STATES OF AMERICA, Appellant

v.

AMERICAN LIBRARY ASSOCIATION, et al., Appellees

On Appeal From the U.S. District Court
for the Eastern District of Pennsylvania

BRIEF *AMICI CURIAE* OF PARTNERSHIP FOR PROGRESS ON THE DIGITAL DIVIDE, THE GAY LESBIAN STRAIGHT EDUCATION NETWORK, HARLEM LIVE, PACIFIC NEWS SERVICE, PEACEFIRE, ROCK OUT CENSORSHIP, TRUCE, and WIRETAP MAGAZINE, IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are organizations working to bridge the digital divide – the gaps in access, content, skills, and training that thwart effective use of information technologies and services which are essential to full participation in today's digital age democracy. *Amici* are concerned that CIPA, by mandating Internet filters in public libraries, worsens the digital divide and as a result relegates many Americans to second-class information citizenship. They file this brief in order to assist the Court in evaluating the constitutionality of CIPA's filtering mandate.[1]

SUMMARY OF ARGUMENT

I. From a luxury enjoyed by the few, access to the Internet has today become essential to citizens' ability to communicate, gather information, and participate in democratic life. Yet many Americans, including lower-income citizens, the elderly, the disabled, residents of rural areas, those with limited English skills, and other minorities, remain at a disadvantage. Some of them lack Internet access at home, school, or work. Others lack the skills and training needed to use the Internet effectively. In many cases, they are subject to both disadvantages simultaneously. Public libraries have played a major role in narrowing these gaps and hence bridging the digital divide.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party or by any person or entity other than the *amici*. See the appendix for a description of the *amici*.

II. CIPA's mandate of filtering in libraries that receive federal aid for Internet connections threatens to undo these gains. As the district court found, Internet filters, even at their least restrictive settings, block tens of thousands of valuable, non-pornographic Web pages. For Americans who rely on the Internet at libraries for job searches, health information, continuing education, and many other needs, CIPA thus has particularly harsh consequences.

Filters also obstruct online communication that has become essential to democracy. As a result, they undermine public libraries' core functions as information providers and as conduits for participation in democratic life.

III. Because Internet access at public libraries creates a public forum, the district court correctly applied First Amendment strict scrutiny to CIPA. But even under rational basis review, the law is unconstitutional. The irrational operation of key word-based filtering, the secret and discretionary nature of filtering companies' decision-making, and the inevitable blocking of numerous useful, non-pornographic Web sites, render CIPA particularly irrational in its impact on those Americans who are on the underside of the digital divide.

ARGUMENT

I DIGITAL TECHNOLOGY HAS GIVEN RISE TO A "DIGITAL DIVIDE" THAT PUTS A NUMBER OF DEMOGRAPHIC GROUPS AT A SERIOUS DISADVANTAGE IN ACCESSING THE INCREASINGLY ESSENTIAL RESOURCE OF THE INTERNET

A. *The Internet is Now Essential to Participatory Citizen Discourse, Job Searching, Obtaining Health Information, Learning About Government Programs, and Day-to-Day Research on Many Other Topics*

The Internet has grown exponentially in the last decade. It has changed the way Americans communicate with each other, gather essential information, and participate in the democratic process. As this Court has said, the Internet is a "vast democratic forum," with content "as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997).

The district court found that as of September 2001, there were approximately eleven million World Wide Web sites, containing about two billion separate Web pages. J.S. App. 30a. Contained within this vast resource is information on many important topics: government programs and policies; job searches and careers; educational and training opportunities; health (including vital information on sexual health); religion and services available from religious organizations; history, literature, art, and music; translations of information that are especially useful to Hispanic Americans and other language minorities; interactive sites that advance participatory democracy; and sites providing commercial information about products and services.

Much of this information is simply not available off-line. The Colorado Department of Education has pointed out that in some cases the Internet is now the *only* point of access to "a wide variety of government services, educational materials, health resources, communication tools and commercial activities." Hence, it becomes ever more important "to ensure equal access to information for all segments of society."[2]

As the National Telecommunications and Information Administration recently concluded: "We are approaching the point where not having access to these tools is likely to put an individual at a competitive disadvantage and in a position of being less than a full participant in the digital economy."[3] In its 2002 report on the digital divide, the Consumers Union concurred: "Being disconnected means being disadvantaged and disenfranchised. Being connected is essential to education, public health, [and] public safety."[4]

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[2] Tammi Moe & Keith Curry Lance, *Colorado Public Libraries and the "Digital Divide," 2002* 1 (Library Research Serv., Colorado State Library, Colorado Dep't of Education, Oct. 2002). In addition, e-mail is now a primary means of daily communication. Not having an E-mail address puts an individual at a serious disadvantage in economic, social, and political life.

[3] NTIA, *Falling Through the Net: Toward Digital Inclusion* xviii (U.S. Dep't of Commerce, Oct. 2000) (ALA Pl. Ex. 40); see also *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002) ("[c]omputers and Internet access have become virtually indispensable in the modern world of communications and information gathering"; hence, probation condition barring all Internet use was unreasonable).

[4] Mark Cooper, *Does The Digital Divide Still Exist?* 8 (Consumers Union, May 30, 2002).

B. *Lower-Income People, the Elderly, the Disabled, Those Living in Rural Areas, Those With Limited English Skills, and Other Demographic Groups Lack Full Access to the Internet or the Skills and Training to Use It, But Public Libraries Have Helped Bridge the Gap*

1. The Scope of the Digital Divide

The digital divide affects lower-income citizens, the elderly, the disabled, people living in rural areas, those with limited English skills, and other demographic groups. Although progress has been made – in large part thanks to public libraries – in getting these citizens online and giving them the skills needed to take advantage of information technology, there is still a large gap, and in fact, the digital divide has been growing.

Between July 1995 and February 2002, the National Telecommunications and Information Administration (NTIA), a branch of the U.S. Department of Commerce, documented the digital divide in five separate reports. In the first report, in 1995, the NTIA noted that those lacking access to the Internet were disproportionately lower-income citizens living in both rural areas and central cities. In terms of age, senior citizens (55 years and older) in rural areas had the lowest ownership of computers. Rural African Americans had the lowest computer-use rates. Yet minorities surpassed Whites in the percentage who used the Internet to search classified ads, take courses, and access government reports.[5]

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[5] NTIA, *Falling Through the Net: A Survey of the "Have Nots" in Rural and Urban America* (U.S. Dep't of Commerce, July 1995), § I.

The NTIA's second report, in 1998, found that while computer use had increased nationwide, there was still a significant digital divide "based on race, income, and other demographic characteristics." In fact, there was now an even greater disparity than in 1995 between upper and lower-income groups. There was also a marked age disparity, with only 20% of those aged 55 and older having access to a computer at home (and only about 7% having Internet access), compared to nearly 50% computer penetration and 25% online access for those aged 35-44.[6]

The NTIA found these disparities to present a serious public-policy concern, since lower-income Americans are the ones who most need the Internet "to find jobs, housing, and other services." The report concluded that because it would take time before citizens in these groups are connected at home, it was essential that schools, libraries, and other community access centers make the Internet available.[7]

The third report, published in 1999, told much the same story. Internet access had again increased, but the digital divide had widened. "Minorities, low-income persons, the less educated, and children of single-parent households, particularly when they reside in rural areas or central cities, are among the groups that lack access to information

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[6] NTIA, *Falling Through the Net II: New Data on the Digital Divide* (U.S. Dep't of Commerce, July 1998), § III; charts 16, 22. The NTIA used nine separate household income categories, ranging from under $5,000 to over $75,000. Almost ⅓ of the U.S. population has a household income below $25,000. U.S. Census Bureau, *Current Population Survey* (Aug. 2000), Table A-1; *Does the Digital Divide Still Exist?*, *supra* n.4, at 4.

[7] *Falling Through the Net II*, *supra* n.6, § IV.

resources." At the same time, though, some of those who lacked access at home or work were "using the Internet at public facilities, including schools and libraries," and "in ways that will help them advance economically and professionally."[8]

In its fourth, October 2000 report, the NTIA documented gains in Internet access among many groups affected by the digital divide. It found that there were now 116.5 million Americans online "at some location," 31.9 million more than there were only 20 months earlier. The increase occurred among all groups, with former digital "have nots" now "making dramatic gains." In rural areas, for example, 38.9% of households now had access, a 75% increase from 1998. Internet access in African American households rose from 11.2% to 23.5%.[9]

Nevertheless, the digital divide remained, and had again expanded in some cases. People over age 50 continued to have the lowest rate of Internet use (with the exception of young children). Those with disabilities were only half as likely as the rest of the population to live in homes with Internet access; and close to 60% of them had never used a computer. The difference between access rates for African

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[8] NTIA, *Falling Through the Net: Defining the Digital Divide* (U.S. Dep't of Commerce, July 1999), Introduction. The report noted that urban households with incomes of $75,000 and higher were more than 20 times more likely to have Internet access than rural households at the lowest income levels. Within the low-income population, those living in rural areas were only half as likely to have access as those with the same income in urban areas. *Id.*, Executive Summary.

[9] *Falling Through the Net: Toward Digital Inclusion*, *supra* n.3, Introduction.

American households and the national average had widened (23.5% penetration rate for African Americans compared to 41.5% for households generally). The same was true for Hispanic households. While about a third of Americans used the Internet at home, only 16.1% of Hispanics and 18.9% of African Americans did so.[10]

On the other hand, the NTIA reported that many of those disadvantaged by the digital divide *were* making important use of the Internet. Low-income individuals "were the most likely to report using the Internet to look for jobs." And libraries were providing a critical means of access. The unemployed, African Americans, Asian Americans, and Pacific Islanders were "far more likely" than others to access the Internet at public libraries.[11]

The NTIA's most recent report again showed that despite increased Internet use overall, the digital divide was growing. Between 1997 and 2001, the gap between individuals aged 25-49 and those over 50 using the Internet had increased from 15.9% to 26.8%. The disparity in Internet use between employed and unemployed citizens rose from 35.3% to 53.9%. And the gap between Whites and Hispanic

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[10] *Id.* at Introduction, 41, 61. A study by the Children's Partnership at about the same time noted other barriers: an estimated 87% of documents on the Internet are in English, although "at least 32 million Americans speak a language other than English as their primary language." Children's Partnership, *Online Content for Low-Income and Underserved Americans: The Digital Divide's New Frontier* 8 (Mar. 2000).

[11] *Falling Through the Net: Toward Digital Inclusion, supra* n.3, at xviii.

Americans went from 14.3% to 28.3%.[12]

Yet the importance of the Internet, and of libraries in providing access, also became more evident. Twenty-three percent of Internet users with household incomes under $15,000 went online to search for jobs, compared to only 14.6% of those with household incomes over $75,000. Ten percent of Internet users overall went online at public libraries, but 18.7% of African American Internet users and 13.8% of Hispanic Internet users did so. Among racial and ethnic groups, 12.7% of Whites, 19.4% of African Americans, and 16.0% of Hispanics using the Internet at libraries did not also access the Internet from home, work or school.[13]

2. <u>The Role of Libraries</u>

Public libraries have played a critical role in ameliorating the harsh consequences of the digital divide. Between 1998-2000, libraries in all communities – high and low income; urban, suburban, and rural – expanded Internet access. In low-income areas, access at libraries increased from about 76% to about 94%. And critically important, access was frequently accompanied by librarian assistance, skills

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[12] NTIA, *A Nation Online: How Americans Are Expanding Their Use of the Internet* 26 (U.S. Dep't of Commerce, Feb. 2002) (ALA Pl. Ex. 56). See also Leslie Harris & Associates, *Bringing a Nation Online: The Importance of Federal Leadership* 3 (July 2002) (report for the Leadership Conference on Civil Rights and the Benton Foundation) (despite progress, the digital divide remains an obstacle, so that for many Americans, "the enormous social, civic, educational and economic opportunities offered by rapid advances in information technology remain out of reach").

[13] *A Nation Online, supra* n.12, at 34, 40.

training, and provision of special hardware or software for those with disabilities.[14]

For example, by 2000, 62.3% of libraries offered Internet training.[15] A 2002 survey by the Colorado Department of Education found that 59% of library patrons felt they had improved their online skills through using library computers; the number was ⅔ for minority respondents. People aged 55 and over were three times as likely to learn new technology skills through a library course than any other age group, and twice as likely to do so with staff assistance. The report concluded:

> The technology *have-nots* are not just the poor and under-educated. People from all walks of life rely on the Internet access provided by public libraries. This survey shows that library patrons are teaching themselves new technology skills, communicating on a global level, and accessing online information regarding education, health, employment, and volunteer opportunities. As a result, they are able to improve their personal quality of life and that of their communities.[16]

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[14] John Carlo Bertot & Charles McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables* 3, 17, 20 (Information Use Management & Policy Institute, Florida State U., Sept. 2000) (ALA Pl. Ex. 37).

[15] *Id.* at 20.

[16] Moe & Lance, *supra* n.2, at 6-8, iii. With respect to age, the report noted that libraries "provide the only Internet access for a substantial portion of every age group. Older patrons with less computer experience rely on Internet access through public libraries, staff assistance and library courses more than any other

Another report in 2002 found that those relying on libraries for information technology benefitted in numerous ways, among them developing basic literacy skills, obtaining consumer advice, and accessing state, local, and federal government information. They not only conducted job searches but prepared cover letters and resumés at the library, and added "basic computer and Internet skills to their resumés so as to be more marketable." Migrants and summer help "were trained to used the Internet at the library in several locations in cooperative programs with local or state governments."[17]

In sum, the environment created through Internet access in public libraries is essential to bridging the digital divide for reasons beyond mere access. As the Children's Partnership reported: "oftentimes residents in low-income communities use a neighborhood technology program [which includes library programs] even if they have a computer and Internet access at home." This is because community-based technology programs provide "a helpful and familiar

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group. This might suggest that people over 55 use public library technology more than any other age group because of the help available." *Id.* at 19. The report also found that 44% of respondents looking for educational programs on library computers had annual incomes under $19,000; 29% using public library terminals for distance education were below poverty level; 35% of those looking for jobs online at libraries were below poverty level; and 28% of those seeking information on social programs were below poverty level. *Id.* at 24-25.

[17] Charles McClure *et al.*, *Public Library Internet Services and the Digital Divide: The Role and Impacts From Selected External Funding Sources* 73-76 (Information Use Management & Policy Institute, Florida State U., Jan. 2002) (ALA Pl. Ex. 87).

atmosphere and the chance to learn new things and ask staff for coaching when they have trouble."[18]

All of these gains have been due in no small part to the LSTA and E-rate programs. One of the LSTA's goals is to target information services to under-served, rural, and low-income communities. 20 U.S.C. § 9141(a). Similarly, E-rate discounts for eligible libraries range from 20% to 90%, depending on the level of economic disadvantage in their communities, and their location (urban or rural). J.S. App. 15a; Michael Puma *et al.*, *The Integrated Studies of Educational Technology: A Formative Evaluation of the E-Rate Program* 7-8 (Urban Institute, Oct. 2002). As the district court found, about 70% of libraries serving very low-income areas receive E-rate discounts. J.S. App. 36a-37a.

But it is also important to note that libraries in communities ranging across the demographic spectrum receive assistance from the LSTA and E-rate programs. They use or leverage these funds to provide not only Internet connections, but also technical support, skills training, special screens for the visually impaired, and other aids to the disabled.[19] Thus, the E-rate has not only "provided a partial

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[18] Children's Partnership, *Online Content for Low-Income and Underserved Americans: An Issue Brief by the Children's Partnership* 7 (2002).

[19] On the importance of the E-rate in enabling libraries to leverage funds, see McClure *et al.*, *supra* n.17, at 97-101; Urban Institute, *E-Rate and the Digital Divide: A Preliminary Analysis From the Integrated Studies of Educational Technology* 19 (U.S. Dep't of Education, 2000) (by giving public libraries "access to affordable telecommunications and advanced digital technologies," the E-rate "expands their technology capacity, and by freeing up resources that would have otherwise been spent on tele-

'financial bridge' across the digital divide separating the poor, minorities, and geographically isolated from equitable access to computers and the Internet."[20] It has provided Internet access for all Americans who use libraries, including older and disabled Americans who are on the underside of the digital divide.

As the district court concluded:

> Public libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10% or 14.3 million people, access the Internet at a public library. ... By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access [and thus] ... greatly expand the educational opportunities for millions of Americans.

J.S. App. 36a, 130a.

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communication expenses, allows scarce resources to be used to support other aspects of needed technology infrastructure, especially the critically important area of staff professional development").

[20] Puma *et al.*, *supra* p.12, at 20.

II INTERNET FILTERS UNDERMINE THE PROGRESS THAT LIBRARIES HAVE MADE IN BRIDGING THE GAP AMONG DEMOGRAPHIC GROUPS, AND HENCE EXACERBATE THE DIGITAL DIVIDE

A. *Filters by Their Nature, and Even at Their Most "Minimal" Settings, Block Large Amounts of Valuable, Non-Pornographic Information*

As the district court found, Internet filters block access to tens of thousands of valuable, non-pornographic Web pages on a host of subjects ranging from religion to medicine. The problem stems from the nature of filtering technology, and hence cannot be cured by "improvements" in the computer programs that filtering companies use to compile their blacklists.

The fundamental problem with Internet filtering is that it assumes human expression can be categorized based on "artificial intelligence" (*i.e*, key words and phrases). As expert witness Geoffrey Nunberg explained, there are some tasks that computers simply cannot do, "both because they involve subjective judgments and because they rest on a broad background of human knowledge and experience that computers cannot easily acquire." Expert Report of Geoffrey Nunberg, ALA Pl. Ex. 70, at 78; see also J.S. App. 59a ("artificial intelligence" text classification systems are inherently "unable to grasp many distinctions between types of content that would be obvious to a human").

Although filtering companies claim that their employees review most Internet sites before they are blocked, this is belied, as the district court found, by the nature of the Web and the operation of filters. Human review of even a fraction of sites is impossible, given the size of the Internet and the

fact that millions of Web pages change every day. Hence, blocking relies primarily on mechanical key words and phrases that cannot possibly evaluate context or style, no less such subjective factors as "patent offensiveness" or "serious value" – both, of course, elements of this Court's obscenity test. As the district court found, often whole sites are blocked when only one page is even arguably problematic; and filtering companies maintain their codes and blacklists as secret, proprietary information. J.S. App. 48a-65a.

The court gave numerous examples of the tens of thousands of sites erroneously blocked by filters, even at their least restrictive settings. In some instances, the errors were the result of deliberate miscategorization; in others, the result of overzealousness by company employees; and in most, simply a consequence of the mechanical nature of the filtering process. Many of the blocked sites have particular importance for citizens who are disadvantaged by the digital divide and who depend on libraries for Internet access.

Examples included:

- **Health sites**, including a guide to allergies, blocked by the Bess filter as "adults only/ pornography"; a health Q&A site sponsored by Columbia University, blocked by Bess as "sex" and by SmartFilter as "mature"; a disability home page, blocked by Bess as "pornography"; and a cancer treatment center, blocked by Websense as "sex."[21]

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[21] See also Peacefire's documentation of Cyber Patrol's blocking of the American Cancer Society site (peacefire.org/censorware/Cyber_Patrol/caps/cancer.org.blocked-1-6-2002.gif), and Websense's blocking (as "sex") of the site KinderGarten.org, an organization funding free vaccinations for children in India.

- **Political sites**, including one for a libertarian candidate, another for a local selectman, and another for Wisconsin Right to Life – all blocked by Bess as "nudity"; a site opposing the death penalty, blocked by Bess as "pornography"; and a site on Uganda, blocked by Bess as "adults only/pornography."

- **Job search, education, and career sites**, including one for social workers and another involving home schooling, both blocked by Cyber Patrol as "adult/ sexually explicit"; a site encouraging local business to develop relationships with the gay community, blocked by Bess as "adults only/pornography"; and a site for aspiring dentists, blocked by Cyber Patrol as "adult/sexually explicit."

- **Religious sites**, including the Knights of Columbus, blocked by Cyber Patrol as "adult/sexually explicit"; the Lesbian and Gay Havurah of Long Beach, California, blocked by Bess as "adults only/ pornography" and by SmartFilter and Websense as "sex"; a site that sells religious wall hangings, blocked by Websense as "sex"; and a Christian orphanage, blocked by Cyber Patrol as "adult/sexually explicit."

J.S. App. 86a-89a, 155a.[22]

(peacefire.org/censorware/WebSENSE/caps/kindergarten-org-blocked-sex.11-26-2001.html).

[22] There are countless other examples: "humpback" whales; "magna *cum* laude"; "*pussy* willows"; Dr. Everett Koop's health site (blocked as "glamor and intimate apparel"); and the site titled "penismightier." See ALA Pl. Ex. 70, at 71, 72; Trial Testimony of E. Rood, J.A. 227; Free Expression Policy Project, *Internet*

The irrationality of filtering technology is compounded by evidence of deliberate viewpoint-based blocking. Geoffrey Nunberg described the criteria that filtering companies use based upon their "target markets and their overall philosophy," their systematic blocking of sites related to sexual health, and their "well-documented" practice of invoking the "sex" category to block sites critical of the filtering company. ALA Pl. Ex. 70, at 39-40, 74-75; see also Trial Testimony of Christopher Hunter, Mar. 26, 2002, at 238, 258-59 (describing blocking of sites critical of filtering, or of Internet censorship generally); E. Rood Testimony, J.A. 230 (blocking of gay and lesbian sites); Appendix to Expert Report of Christopher Hunter, ALA Pl. Ex. 85, at 36 ("[i]n examining the blocking decisions of filter makers, their political biases become readily apparent").

The breadth, unfettered discretion, and frequent irrationality of Internet filtering cannot be overstated. Describing mistakes in terms of percentages tends to mask the problem: as Nunberg explained, even a 2% error rate means wrongly blocking about 40 million innocent Web pages. ALA Pl. Ex. 70, at 84.[23] Entire news and commentary sites such as Salon.com are blocked. Translation sites that convert works from English to other languages, and thus are of great value to Hispanic Americans

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Filters: A Public Policy Report 22, 44 (2001), www.fepproject.org/policyreports/filteringreport.pdf

[23] Despite the claims of filtering companies, their actual error rates, to the extent they can be determined at all given the subjectivity of blocking categories, are well above 2%. As the district court noted, even the government's expert found that 6-15% of the blocked sites that he analyzed "did not contain content that meets even the filtering products' own definitions of sexually explicit content, let alone CIPA's definitions." J.S. App. 91a.

with limited English skills as well as many other language minorities, are blocked wholesale because the filtering companies believe their host sites might be used to circumvent filtering. Vital health information about safer sex and pregnancy prevention is routinely and deliberately blocked, as are sites (not sexually explicit) that are important to gay men and lesbians. All filters, including the three most used by libraries, censor thousands of useful Web sites that have nothing to do with pornography. J.S. App. 48a-94a.

The LSTA and E-rate programs were both in part intended to bridge the digital divide by helping library patrons access the Internet. Requiring filters on library computers undermines that goal by relegating those who rely on libraries to second-class Internet access. As a consequence, CIPA undermines their ability not only to communicate via the increasingly important mechanism of e-mail, but to find needed information about health, jobs, civil rights, politics, and many other topics.

B. *Filters Obstruct the Process of Communication Central to a Participatory Democracy*

The importance of access to information in a constitutional democracy cannot be overstated. As James Madison recognized, the ability to acquire uncensored information is essential for citizens' constitutional participation:

> A popular Government, without popular information, or means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 *Writings of James Madison* 103 (Gaillard Hunt ed.) (NY: Putnam's, 1910). Hence, the right to receive information, which is the value most implicated by CIPA's restrictions on library patrons, is the foundation of the process of communication central to a democracy.

In numerous contexts, this Court has wisely recognized the importance of the right to receive information and ideas. See, *e.g., Reno v. ACLU,* 521 U.S. at 874; *Board of Education v. Pico*, 457 U.S. 853, 867 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Martin v. Struthers*, 319 U.S. 141, 143 (1943). The reason is simple: without unfettered access to expression, there can be no democratic discussion and debate. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). And in carrying on this debate, "it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind ... In this field every person must be his own watchman for truth." *Thomas v. Collins*, 323 U.S. 516, 545 (1945).[24] The irrational constraints that filters place on library patrons' participation in the communication process are inconsistent with this Court's affirmation of the First Amendment right to receive information and ideas.

This Court's recognition that freedom to speak and freedom to hear are inseparable is substantiated by the trans-actional model of communication used by scholars in the

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[24] See also George Lakoff & Mark Johnson, *Metaphors We Live By* 10-13 (Chicago: U. of Chicago Press, 1980); Mary Elizabeth Bezanson, "Two Sides of the Same Coin: Evolution of the Right to Receive," in 28 *Free Speech Yearbook* 81 (1990).

communication discipline.[25] The model, which describes the process of communication, includes the sender, receiver, channel, message, and noise, another important concept implicated by CIPA.

Noise refers to anything that interferes with the reception of a message or frustrates communication. For example, a radio turned up very loud might make it impossible for two people to carry on a conversation, or a reader might not be able to locate needed information if pages are missing from a book. In those cases, the receiver can compensate for the noise by turning down the volume of the radio or getting another copy of the book. In contrast, filters present a particularly insidious and insurmountable obstacle for Internet communication – filters are hidden noise. Because filters present only "approved" Web sites and block all other information, the receiver does not know that there is any information missing or what it might be. As a result, a library patron conducting a search for information, who has no choice but to use a filtered Internet terminal, would have no opportunity to compensate for the obstruction to the process of communication caused by CIPA-mandated filters; the patron would be left with only a warped version of the knowledge sought and would not even be aware of that fact.

The protection of access to the ideas of others through the public library, even access to ideas with which the majority may sharply disagree, is a paramount concern for the future of America in the digital age. As Alexander Meiklejohn wrote:

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[25] See, *e.g.*, Dean C. Barnlund, "A Transactional Model of Communication," in *Foundations of Communication Theory* 83-102 (Kenneth K. Sereno & C. David Mortensen, eds.) (NY: Harper & Row, 1970).

> When men govern themselves, it is they – and no one else – who must pass judgment upon unwisdom and unfairness and danger. ... Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (NY: Harper & Brothers, 1948).

Libraries of this nation, and the Internet access they provide, must remain free from government or corporate decisions about the acceptability of ideas. Without such freedom, the process of communication central to a participatory democracy will be irreparably harmed.

C. *Filters Undermine the Core Functions of Libraries in a Democracy, With Especially Harsh Consequences For Those Already Harmed By the Digital Divide*

From equal access to the free flow of information, libraries embody democracy and the values shared by American citizens. As one participant in a recent study explained, "I think as we are seeing the population . . . stratifying along class lines in a huge way . . . the library is one of those symbolic things that is left, that is a cornerstone of 'we all do this for everyone' so that everyone can use it." Benton Foundation, *Buildings, Books, and Bytes: Libraries and Communities in the Digital Age* (Nov. 1996), reprinted

in 46 *Library Trends* 178, 204 (Summer 1997).

Federal support for libraries has a long and successful history, beginning with support for bringing libraries to rural communities, then assisting disadvantaged communities, encouraging diversity, building and renovating facilities, providing job information centers, and fostering literacy. See Kathleen Molz & Phyllis Dain, *Civic Space/Cyberspace: The American Public Library in the Digital Age* 89-122 (Cambridge, MA: MIT Press, 1999). In today's digital age, when the Internet is the locus of citizenship and individual success in modern civil society, libraries, with the necessary assistance of federal funding, continue to play a pivotal role as an information commons, empowering communities to utilize new technologies.

The digital divide is not just about who has access to new information technology. It also involves producing online content relevant to people's lives, creating motivation for people to learn, training to teach skills, and cultivating 21st century literacy. While E-rate and LSTA funding, which promote access, help pave the road to the Information Superhighway, public libraries add crucial value to that funding by serving the public's needs beyond mere access, and by leveraging federal support as a catalyst for substantial additional funding from state, local, and private sources.

The information technology access that public libraries provide for patrons with the assistance of E-rate and LSTA funding is indispensable. Libraries, which in the past supplied links to information available beyond their own collections through interlibrary loan, now provide vital links to information through cyberspace. Consider that approximately 17.5 million Americans lack telephones in

their homes, let alone computers and Internet access.[26] Public library Internet access spans all demographic groups and fulfills an essential patron need.

Employing the information technology access that federal funding allows, public libraries serve additional core functions that further empower all Americans in the digital age. In terms of traditional, basic literacy, an estimated 44 million American adults do not have the reading and writing skills necessary for functioning in everyday life.[27] The Internet is an important resource that libraries use to teach literacy skills: "'When people come in [to the library] who can't read, we encourage them to go to the Web and go to sites that contain many pictures.'"[28] Indeed, according to one

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[26] See U.S. Census Bureau, *Statistical Abstract of the U.S.: 2001* 50 (Jan. 2002); "Telephone Penetration In The United States, 1983-2000," in Federal Communications Comm'n, *Statistics of Communications Common Carriers* 228 (2000/01 ed.) (Sept. 2001); Jorge Reina Schement, "What Jefferson Knew and de Tocqueville Saw: Libraries Measuring the Digital Divide," paper presented at "The Digital Divide's Multiple Dimensions" Public Policy Roundtable, Pacific Bell/UCLA Initiative for 21st Century Literacies 3 (Aug. 2-5, 2002) ("[a]pproximately seven million American households lack telephone service. At an average of 2.5 persons per household, that leaves 17.5 million individuals unconnected to the most basic telecommunications technology").

[27] National Center for Education Statistics, *National Adult Literacy Survey*, Introduction (1992), novel.nifl.gov/nifl/facts/NALS.html. Literacy experts define a functional literacy level as, for example, being able to locate an intersection on a street map or calculate the costs of a purchase from an order form. *Id.*

[28] Martha Shimmers, Librarian, quoted in Children's Partnership, *Online Content for Low-Income and Underserved Americans: The Digital Divide's New Frontier* 16 (Mar. 2000).

scholar, computers allow the mastery of knowledge that was previously inaccessible, and foster an unprecedented diversity of learning styles and self-directed work.[29]

In the digital age, public libraries are the primary civic institutions entrusted with the responsibility to teach and promote the new expanded literacy demanded by the information society. In fact, as the amount and choices of information have multiplied, libraries have become more key, and patrons have a greater need for the services, training, and skills that libraries teach. These skills extend beyond the traditional reading, writing, math, and science. They now include technology literacy, information literacy, social competence and responsibility, and much more.[30]

This new concept of literacy is presenting formidable challenges for education, the workplace, and civic engagement, but the basic values of librarianship applied to the digital age with the support of federal funding allow public libraries to help individuals effectively use the tools of the Internet to participate fully in contemporary American life. For individuals who have lower skill levels, less income, limited English proficiency, or disabilities, or who face other challenges, Internet access in public libraries is an even more crucial resource.

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[29] Seymour Papert, *The Children's Machine: Rethinking School in the Age of the Computer* (NY: Basic Books, 1993).

[30] On the aspects of literacy in today's electronic and digital world, see White Paper to the 21st Century Literacy Summit, *21st Century Literacy in a Convergent Media World* 4 (Mar. 2002), www.21stcenturyliteracy.org/white/

Thus, the nexus of Internet access and public libraries is the meeting place of democracy, equity, and access to information and knowledge in 21st century America. Without unfettered Internet access, patrons would be deprived of the most basic functions of modern libraries. The unique qualities of Internet access in public libraries hold a special importance in life in the digital age – library Internet access is essential in helping citizens bridge the digital divide in terms of connectivity, content, and skills, and in fostering independence, freedom of thought, good judgment, and responsibility.

Imposing filters on this resource through CIPA undermines the ability of libraries to teach and patrons to develop these democratic values. Indeed, the notion that privileged citizens who have information access without the use of public facilities can choose whether or not to use filters, while those dependent on government-funded information access have no choice, is inimical to the nature of democracy.

Further, by suggesting that citizens must find an alternative means to access the information they are denied through a filtered public library computer, CIPA may well be unintentionally cultivating a climate that socializes and conditions the uncritical acceptance of restrictions on debate in public forums which are the foundation of democratic deliberation.[31] If the majority of libraries across America are forced to choose between remaining true to their mission as public information gateways or acting as the agents of private

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[31] See Susan B. Kretchmer, "The Library Internet Access Controversy and Democracy," in *Libraries and Democracy: The Cornerstones of Liberty* (Nancy Kranich, ed.) (Chicago: American Library Association, 2001).

corporate information gatekeepers, and are forced to choose between maintaining current levels of services or slashing those services as a result of forgoing E-Rate and LSTA funding, the ultimate harm will be to America's information-disenfranchised citizenry and to democracy.

III CIPA'S MANDATE OF INTERNET FILTERS AS A CONDITION OF LSTA OR E-RATE FUNDING VIOLATES THE FIRST AMENDMENT RIGHTS OF ALL LIBRARY USERS, ESPECIALLY THOSE ON THE UNDERSIDE OF THE DIGITAL DIVIDE

A. *The District Court Correctly Found that the Internet is a Public Forum; Hence, It Appropriately Applied Strict Scrutiny to CIPA*

The Internet is not only an essential resource in today's world; it is an encyclopedic one, providing information, ideas, and opportunities for communication on every conceivable topic. Thus, as the district court found, even when filtered, Internet access at public libraries possesses the quintessentia' characteristics of a public forum. Under this Court's precedents, CIPA's content-based restrictions on Internet access are therefore subject to strict First Amendment scrutiny.

This conclusion is reinforced by the fact that CIPA imposes restrictions on libraries. Like universities and public fora, libraries are in the business of free expression. Their core function is to provide "a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995).[32] Libraries play a critical

[32] See also *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (like a public forum, a university is "a traditional sphere of free

role in providing a wide range of information to citizens, including those disadvantaged by the digital divide. Libraries have helped introduce generations of underprivileged Americans into democratic life.

Restricting communication that benefits a disadvantaged population also creates serious First Amendment problems because the disadvantaged group is unlikely to find alternative means of access. Thus, as the district court perceived, CIPA's restrictions resemble those struck down in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). This Court in *Velazquez* recognized that a content-based restriction on the speech that legal services lawyers could engage in on behalf of their low-income clients imposed particular burdens because the clients were unlikely to find other counsel. Similarly here, restrictions on Internet access at public libraries will harm those already disadvantaged by the digital divide, who are unlikely to find other ways to access the job information, educational opportunities, and myriad other benefits of the increasingly essential online world.

Finally, the wholly discretionary, largely irrational, and secretive nature of Internet filtering, combined with its known instances of viewpoint discrimination, underscore the need for strict scrutiny. This Court has consistently adhered to the principle that even in the provision of subsidies, government may not "'ai[m] at the suppression of dangerous ideas.'" *Regan v. Taxation With Representation*, 461 U.S.

expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment").

540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); see also *Perry v. Sindermann*,408 U.S. 593, 597 (1972) (government may not deny a benefit on a basis that infringes constitutionally protected interests, particularly the interest in freedom of speech). Thus, filtering companies' censorship of gay and lesbian sites, sexual health information, and critiques of filtering provide additional reasons for applying strict scrutiny.

B. *Because It Forces Libraries to Delegate Decisions to Private Filtering Companies Whose Products' Operation is Inherently Irrational, CIPA Fails Any Level of First Amendment Scrutiny, Including Rational Basis Review*

Even applying rational basis scrutiny, CIPA is unconstitutional. Its requirement that libraries turn over professional decisions to private companies that do not even reveal their operational processes or blacklists bears no rational relation to the legitimate statutory goal of preventing access to illegal content. The largely arbitrary nature of filters, with their tens of thousands of erroneously blocked sites, likewise bears no rational relation to the statutory goal.

Finally, CIPA's adverse impact on major demographic groups, including lower-income citizens, the elderly, the disabled, those with limited English skills, and other Americans, is so counterproductive, and contrary to any legitimate policy goal, as to render the statute irrational. CIPA cripples libraries' ability to provide all of these Americans with a critical means of communication and information resource in today's world. [33]

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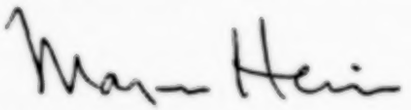
[33] Under any standard of review, Internet acceptable use policies are a less restrictive alternative to filters in accomplishing the

CONCLUSION

Congress's concerns about illegal online content are legitimate, but mandating Internet filters as a condition of federal subsidies cannot be a constitutionally acceptable solution. For these reasons, the decision below should be affirmed.

Respectfully submitted,



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government's goals. They are also more consistent with the American system of justice, which punishes violations of law after they occur, instead of imposing restraints on speech in advance.

APPENDIX: DESCRIPTION OF *AMICI*

Partnership for Progress on the Digital Divide (PPDD) is a not-for-profit organization that is engaging a broad diversity of individuals and organizations to spearhead a multi-associational, multi-disciplinary partnership between scholars, practitioners, and policymakers to make significant contributions in closing the digital divide. PPDD is an affiliate of the National Communication Association, the largest organization of communication teachers and scholars in the world. PPDD is reaching out beyond the communication discipline and academia to various other disciplines and groups in the U.S. and abroad who share interests, methods, and goals and want to work together to build on that common ground to find solutions to this pressing societal concern. PPDD believes that mandating Internet filters in public libraries impinges upon the rights of American citizens to unfettered access to information and, thus, violates the First Amendment and exacerbates the digital divide.

The Gay Lesbian Straight Education Network (GLSEN) is the largest national network of parents, students, educators and others working to create safe schools for lesbian, gay, bisexual and transgender students and staff. GLSEN believes that Web sites with pornographic content are not appropriate for minors. However, GLSEN maintains that Internet filtering programs are not the right approach. Because of the limitations in filtering programs or because of anti-lesbian, gay, bisexual and transgender (LGBT) bias on the part of the software manufacturers, sites with LGBT-related content could be blocked just for mentioning the words "gay" or "lesbian." Thus, valuable information for LGBT youth or about the LGBT community would be barred from those who may need, want, or benefit from such information.

Harlem Live is an Internet publication written, created, presented, and represented by teens in Harlem and throughout New York City. It broadens youth's view of the world using technology and journalism while fostering understanding through diversity. Its core purpose is to empower youth of color to be productive, creative and thoughtful leaders who will be responsible caretakers of our future.

Pacific News Service is a 30-year-old media and communications organization committed to engaging the most marginalized sectors of society in the civic forum. Its Youth Communications Team encompasses seven separate youth media projects including the 12 year-old *YO! Youth Outlook Magazine* (www.youthoutlook.org); *The Beat Within,* a writing program for incarcerated youth operating in six Bay Area county juvenile halls; Silicon Valley De-Bug (www.siliconvalleydebug.org), a community organizing, education and media program in San Jose, California; Poetry Television (www.poetrytelevision.com); *Afghan Journal*; The Civic Arts Partnership; and Roaddawgz (www.roaddawgz.org) – a media arts program for homeless youth. As an established media network and important vehicle for young people to learn personal and professional communications skills, Pacific News Service believes in the importance of unobstructed access to content on the Internet without the intervention of blocking software.

Peacefire (www.peacefire.org) was created to defend the interests of young people in the debate over Internet censorship, and to promote the use of the Internet to reduce discrimination against youth. Peacefire believes that blocking software obstructs progress by targeting controversial subjects, and by conditioning people to accept rules that are created without sufficient justification.

Rock Out Censorship (ROC) was created to defend the First Amendment rights of American citizens, primarily, but not exclusively focusing on music and popular culture censorship issues. The Rock Out Censorship Web site is among those that has been reported as blocked by filtering technology. Students and citizens turning to ROC for information on censorship are thus sadly and ironically prevented from finding that information due to Internet filters.

TRUCE (The Renaissance University for Community Education) is an arts education and media literacy youth development program in Harlem that is committed to equipping young people with the necessary tools to become leaders in their community. TRUCE is concerned about Internet filtering and the digital divide because in order to be an effective and educated leader one needs access to information. Filtering software compromises the ability to access relevant and important information, and thus it is problematic and harmful.

WireTap is a progressive news Webzine for socially conscious youth. It believes that Internet filtering prevents young people from reaching important information online regarding health, politics, and culture. WireTap advocates instead that people be taught media literacy skills, and thus acquire the ability to filter through the media themselves with a critical eye.